CONSTITUTIONAL LAW—CORPORATIONS—ESTOPPEL.—A railroad company, by incorporating under a general act, is estopped to contest the validity, under the federal constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body. *Grand Rapids etc. Railroad Co* v. *Osborn*, 24 Sup. Ct. 310. Citing *Daniels* v. *Tearney*, 102 U. S. 415.

CORPORATIONS—STOCKHOLDER'S LIABILITY—PLEDGEE AS STOCKHOLDER—EFFECT OF TRANSFER OF STOCK.—A transfer of bank stock on the books of the bank in favor of a pledgee which held it as collateral security does not render such pledgee liable as a stockholder for the bank's indebtedness created after the stock has been retransferred on the books of the pledgeor upon payment of the loan, notwithstanding the pledgee's failure to give notice of the retransfer, which, under Ga. Code 1882, sec. 1496, is requisite to exempt from an existing individual liability as a stockholder under a corporate charter, where the stockholder's individual liability under the charter of the bank in question is limited to the par value of his stock "at the time the debt was created." *Brunswick Terminal Co.* v. *National Bank of Baltimore*, 24 Sup. Ct. 314.

EVIDENCE—ADMISSIBILITY OF, NOT AFFECTED BY MANNER OBTAINED—SELF-INCRIMINATON OF ACCUSED—DUE PROCESS OF LAW.—The admissibility of documentary evidence tending to establish the guilt of an accused of the offense charged is not affected because it was secured in violation of the constitutional prohibition against unreasonable searches and seizures.

The self-incrimination of an accused is not affected by the introduction in evidence against him of certain private papers found in the execution of a search warrant, where he did not take the witness stand in his own behalf, as was his privilege, and was not compelled to testify concerning the papers, or make any admission about them. *Adams* v. *New York*, 24 Sup. Ct. 372. Distinguishing *Boyd* v. *United States*, 116 U. S. 616.

REMOVAL OF CAUSES—JOINDER OF CO-DEFENDANT TO DEFEAT RIGHT.—In *Shaffer* v. *Union Brick Co.* (Cir. Ct., Dist. Kansas), 128 Fed. 97, the effect of the joinder in an action in a state court of a citizen of the same state with plaintiff as co-defendant with a non-resident is discussed. We call attention to it as an illustration of the manner in which courts will resent any attempt at a fraudulent taking away of their jurisdiction. The facts were briefly that plaintiff's husband, a citizen of Kansas, was killed by the alleged negligence of his employer, a non-resident of that state. The plaintiff, however, anticipating an effort to remove the cause to the federal court, impleaded as a co-defendant the foreman of the employer-defendant, who was a citizen of Kansas. The cause was removed to the federal court. Upon a motion to remand, the opinion was delivered by Pollock, District Judge. Lack of space alone prevents our reproducing the entire opinion, for it will repay careful examination. The following extracts, however, must suffice:

"The petition is framed on the theory that defendants are joint wrongdoers, and jointly liable in damages for the death of David C. Shaffer. If so, the case

is not removable into this court. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Louisville etc. Railroad Co.* v. *Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Pirie* v. *Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Sloane* v. *Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899.

"It is alleged in the petition for removal filed herein that Ratliff, a citizen and resident of the state of Kansas, was made party defendant for the sole and only purpose of defeating a removal of the case from the state court into this court, but such allegation cannot have effect in this case for two reasons: First, it is not supported by proof. In *Warax* v. *Cincinnati, N. O. & T P. Ry. Co.* (C. C.), 72 Fed. 637, it is said:

"'In order that such joinder should be regarded as fraudulent, it must appear, by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith, with the hope and intention of proving them, or else that they do not state a joint cause of action.'

"Again, it is well settled, if the plaintiff alleges a joint cause of action against the defendants in her petition filed in the state court, and one or more of such defendants are citizens of the state, a nonresident defendant may not remove the case into this court. In *Powers* v. *Chesapeake & Ohio Railway*, *supra*, it is said:

"'It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, "A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint." A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right of prosecuting his suit to a final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'

"In *Louisville, etc., Railroad Co.* v. *Wangelin*, *supra*, it is said to be equally well settled—

'That in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.'

"In other words, the authorities hold that, if plaintiff has in law a joint cause of action against both defendants, she may join them in one action, and no wrong or fraudulent motive will be imputed to her, though the result of her action be to prevent a removal by the nonresident defendant.

"Hence the only question of merit arising upon this motion for determination is, does the plaintiff allege in her petition a joint cause of action against both defendants? If so, the motion to remand must be granted.

"The almost universal practice in vogue of late years, and more especially since the decision of the *Chesapeake & Ohio Ry.* v. *Dixon* (179 U. S 131, 21 Sup. Ct. 67, 45 L. Ed. 121, decided in October, 1900), of joining a local resident defendant, like an engineer, fireman, brakeman, or other employee, with the nonresident master, to prevent the removal by the master from the state to the federal court, demands a consideration and determination of this question upon principles alike applicable to all this class of cases. Doubtless there are cases of this character where the allegations of joint liability are so ridiculous or absurd upon their face that the court would be justified, from a simple inspection of the record, in holding that no joint liability does or could exist in the case. Again, no doubt there are cases in which it might be alleged in the petition for removal, and shown by proof, that a resident employee was fraudulently joined with a nonresident master for the sole purpose of preventing removal of the case by the master; but in comparison with the great body of litigation upon this question such cases are quite infrequent in occurrence, and depend more upon the ingenuity and skill of the pleader drafting the petition than the true circumstances of the particular case. It is manifestly both unsafe and unsound to allow the ultimate determination of the right of removal from the state to the federal courts to rest upon the ingenuity of counsel drafting the pleadings; for, as said by Mr. Justice Miller in *Board of County Comm'rs* v. *Kansas Pac. Ry.* (4 Dill. 277, Fed. Cas. No. 502):

"'It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.'

"As the right of the nonresident master, joined in an action to recover damages for negligence with the resident servant charged with committing the act of negligence, to remove the action from the state into the federal court must be tested by the petition of the plaintiff filed in the state court, the broad general proposition for consideration is, under what circumstances may such joinder be made? In what case does a joint liability on the part of the master and negligent servant exist in law? In principle and upon authority, as gathered from the law writers and adjudicated cases upon this proposition, is the master jointly liable with his negligent servant in all cases or in any case? If so, what is the reason for such joint liability or nonliability, in the absence of statutory enactment upon the subject?

"I am persuaded from an examination of the authorities that its solution must depend upon the character of the act charged as negligent, and the fundamental distinction between the nature or ground, in law, of the liability of the master and that of the servant for an injury resulting to a third person in consequence of the negligent act of a servant done in the performance of the mas-

ter's business. In order that there may be a joint liability of master and servant there must be actual negligence, as contradistinguished from imputed negligence of the master, concurring with an act negligently committed by the servant. In common parlance it is said the negligence of the servant occurring in the discharge of his master's business, to the injury of another, is the negligence of the master. This statement, for practical purposes, is true, but it is inaccurate. For such negligence of the servant the master is legally liable, but such liability may rest either on grounds of public policy or upon the ground that the master is liable for his own wrongdoing. The servant may or may not be liable, depending upon the nature of the act performed. For example, a servant may wholly fail to perform any of the duties imposed upon him by the master. Injury resulting to a third person from such failure, the master will be responsible to the injured third person. The servant will not be liable to such third person, but to the master only. In such case there is no joint liability, because the master alone is liable. Again, the servant may violate the express directions of his master, or may commit an act of negligence to the injury of a third person without the knowledge or direction of his master. In such case both the servant and the master will be liable to such injured third party—the servant for negligence in the performance of his duty, the master because on grounds of public policy the law imputes to him and holds him responsible for the negligence of his servant, and this although the negligent act of the servant may have been performed against his express direction and command. In such case the liability is several, not joint. Again, the negligent act of the servant complained of may be done in the presence of the master and under his direction, or in the absence of the master, in pursuance of his express direction or command. In such case both servant and master are liable to an injured third party, and both are negligent in fact, and liable because they are negligent. In such case the cause of action against both is for negligence in fact, and such cause of action may be joint or several, at the election of the party injured."

In *Gustafson* v. *Chicago R. Co.* (Cir. Ct. Western District Missouri), 128 Fed. 85, the same subject is discussed by Phillips, District Judge. His conclusions are as follows:

"A plaintiff has the right to join a citizen of the same state with a citizen of another state as defendants, *although his purpose is to thereby prevent a removal of the cause if the cause of action is in fact joint.*

"Whether or not allegations of fact in a complaint intended to show a joint cause of action against two defendants are true may be put in issue by a petition for removal which alleges that the joinder was solely for the fraudulent purpose of preventing a removal, and may be inquired into and determined on a motion to remand; and if it is found that they were untrue, and that such fact was or could have been known to the pleader, the court is justified in drawing the conclusion, as a matter of law, that the purpose was to prevent the exercise of the right of removal by the nonresident defendant.

"Where an attorney, when drawing a pleading, had knowledge of facts which showed that allegations of negligence made therein against a defendant were without foundation, or notice of other facts to put him on inquiry which would

have led to such knowledge, both he and his client are chargeable therewith; and where such allegations were made for the purpose of showing a joint cause of action against two defendants, one a citizen of the state and the other of another state, it is a fair inference that the defendants were joined for the sole purpose of preventing a removal of the cause by the nonresident defendant.

PLEADING—DEMURRER—STATUTORY RIGHT OF ACTION.—A complaint in an action for libel is demurrable if it fails to allege that before bringing suit plaintiff gave the notice required by the statute under which the action was brought. *Williams* v. *Smith* (N. C.), 46 S. E. 502.

Per Connor, J.:

"Neither our own nor the researches of the learned and diligent counsel have enabled us to discover any case in which this or any similar statute is construed in regard to an action for libel. We are compelled, therefore, to resort to an examination of the question upon general principles and the construction put upon statutes relating to other actions in which the same or similar provisions are found. 'Under the rule both of the common law and under the Codes, when the statute gives a new remedy and prescribes conditions, or if an action of a certain class or against certain parties be authorized only after the performance of similar conditions, the performance of these conditions, whether the right of action exists at common law or is created by statute, must be alleged in the complaint and proved at the trial.' 4th Enc. Pl. & Prac. 655. The principle is clearly stated and well illustrated in *Reining* v. *Buffalo*, 102 N. Y. 308, 6 N. E. 792. The legislature of New York enacted that 'no action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented,' etc. Ruger, C. J., said: 'The inquiry is whether this provision was intended as a condition precedent to the commencement of an action, or simply to furnish a defense to the city in case of an omission to make such demand. We think the plain language of the statute excludes any doubt on the subject. It absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purport to give the city a defense dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. . . . It is competent for the legislature to attach a condition to the maintenance of a common-law action as well as one created by statute, and, when this is done, its averment and proof cannot safely be omitted.'

"This court has given to a similar statute the same construction. Section 757 of the Code provides 'that no person shall sue any city, county, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities.' The section expressly requires the demand to be alleged in the complaint. This court has uniformly held that a failure to allege the demand may be taken advantage of by demurrer. *Love* v. *Commissioners*, 64 N. C. 706. Bynum, J., in *Jones* v. *Com-*